

MINUTES
FRIDAY – JUNE 6, 2003

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:20 a.m., on Friday, June 6, 2003, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Joseph Russell, David Fishbaugh, Kim Lacey, Dr. Garon Smith, Ward Shanahan and Russ Hudson

Board Members Absent: Susan Kirby Brooke

Board Attorneys Present: Tom Bowe and Kelly O'Sullivan, Attorney General's Office, Department of Justice

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Cheryl Romsa for Lesofski & Walstad Court Reporting

Department Personnel Present: Jan Sensibaugh, Director; Tom Livers, Deputy Director; John North, Chief Legal Counsel, Legal Unit (Legal), DIR; Jim Madden, Legal, DIR; Claudia Massman, Legal, DIR; Jolyn Eggart, Legal, DIR; Ed Hayes, Legal, DIR; David Rusoff, Legal, DIR; Keith Christie, Legal, DIR; Steve Welch, Administrator, Permitting & Compliance Division (PCD); Judy Hanson, PCD; Don Vidrine, Chief, Air & Waste Management Bureau (AWMB), PCD; Dave Klemp, AWMB, PCD; Vickie Walsh, AWMB, PCD; Charles Homer, AWMB, PCD; Jan Brown, AWMB, PCD; Sara Williamson, AWMB, PCD; Tom Reid, Water Protection Bureau (WPB), PCD; Eric Regensberger, WPB, PCD; Eugene Pizzini, Community Services Bureau (CSB), PCD; John Arrigo, Administrator, Enforcement Division (ENF); Abe Horpestad, Resource Protection Planning Bureau (RPPB), Planning, Prevention & Assistance Division (PPAD); Chris Levine, RPPB, PPAD; John Coefield, Monitoring and Data Management Bureau, PPAD

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): Harmon Ranney, Montana Coalbed Natural Gas Alliance; Roger Muggli, Tongue & Yellowstone Irrigation District (T&Y); Sara Stanton, Roundup Power; Dan Hoven, Roundup Power; Brenda Lindlief-Hall, Tongue River Water Users Association (TRWUA); Ray Muggli, Tongue River irrigator; Mark Fix; Gail Abercrombie; Jim Parker, PP&L Montana

Agenda

I. ADMINISTRATIVE ITEMS

A. Review and Approve Minutes

1. Review and approve minutes of March 28, 2003 meeting.

Chairman Russell introduced the item. Dr. Smith indicated that he had already noted corrections to the secretary. Dr. Smith MOVED to APPROVE the minutes of the March 28, 2003 meeting. Mr. Shanahan SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously. (Transcript ref. 5:22)

2. Review and approve minutes of April 11, 2003 teleconference meeting.

Chairman Russell introduced the item. Ms. Lacey MOVED to APPROVE the minutes. Mr. Shanahan SECONDED the motion.

Mr. Hudson commented that there was some inconsistency between this set of minutes and the March 28 minutes with regard to the purpose of the April 11 teleconference. He said that in the April 11 minutes, Chairman Russell stated that the purpose of the teleconference was to discuss some of the issues that remained and that there may be some changes made to the standards that were noted due to the decision of the Ninth Circuit Court. Mr. Hudson said that in the March 28 minutes Mr. Bowe suggested that since it would take some time to prepare the final adoption notice, a teleconference could be scheduled to vote on the adoption after the Board had time to review the final notice. Mr. Hudson noted that there was nothing in Mr. Bowe's statements that suggested the Board would reopen the meeting for changes.

Dr. Smith concurred with Mr. Hudson's statements. He suggested the minutes reflect that Chairman Russell elected to open the teleconference to additional discussions.

Chairman Russell suggested that in the future he would confer with the rest of the Board members on items that do not appear to fit with the Board's intent.

Mr. Shanahan noted that the minutes were not incorrect since the statement was indeed made by Chairman Russell. He said that the conflict would reflect in the minutes of this meeting, but that it should not prevent the April 11 minutes from being adopted.

Chairman Russell noted the motion on floor and called for a VOTE. The motion CARRIED unanimously. (9:14)

I. ACTION AGENDA ITEMS

A. Repeal, Amendment or Adoption of Final Rules

1. In the matter of the amendment of ARM 17.38.101, 17.38.201A, 17.38.202, 17.38.203, 17.38.206, 17.38.208, 17.38.216, 17.38.229, 17.38.239, 17.38.249 and 17.38.302, and the adoption of new rule I pertaining to public water supply.

Ms. O'Sullivan conducted the public hearing on April 30. Mr. Hudson inquired as to the location from which the letter of concern had come, but it was not known. Mr. Shanahan MOVED to ADOPT the rule, including the presiding officer's report, the 521 and 311 analyses, and the responses to comments. Dr. Smith SECONDED the motion. The motion CARRIED with a unanimous VOTE. (11:1)

2. In the matter of the adoption of new rules establishing a water quality classification and standards for ponds and reservoirs constructed for disposal of coal bed methane (CBM) water and the amendment of ARM 17.30.706 to establish a mandatory process for Department determinations of significance for discharges of CBM water.

Mr. Livers reminded the Board that they had deferred action on these two items pending the outcome of the Ninth Circuit Court. He explained that the issue was still pending. Mr. Livers announced that Abe Horpestad would discuss a modified proposal that would apply regardless of the outcome of the court proceeding.

Mr. Horpestad reiterated what Mr. Livers said and explained that the legal issue of whether CBM water was or was not a pollutant and whether or not it required a discharge permit had not been settled. He said the other issue was whether the ponds were a pollutant, state water or something in between. Mr. Horpestad confirmed that the new Notice of Adoption redefined ARM 17.30.616.

Discussion took place regarding the ponds, groundwater, the definition of state waters, and the relationship between the landowner and the development company. It was confirmed, through a previous set of minutes, that the Board had previously adopted 3,000 as the EC standard for G-1 classification ponds.

Mark Fix expressed concern that if the Supreme Court were to overturn the decision of the Ninth Circuit Court, ruling that CBM water is not a pollutant, neither a significance determination nor a discharge permit could be applied.

Claudia Massman, DEQ, said it could be regulated under the mandatory nonsignificance determination. Discussion was held regarding pond construction, best management practices, alluvial soils, and on-channel versus off-channel storage ponds.

Gail Abercrombie explained that the ponds and impoundments under authority of the Board of Oil and Gas are fully reclaimed and that the bond release is not given until then.

Brenda Lindlief-Hall inquired about the interaction between DEQ and DNRC, since it is a controlled groundwater area and the water could potentially seep into shallower aquifers. She also asked for the definition of "marginally suitable for irrigation," as stated in ARM 17.30.658.

For "marginally" Mr. Horpestad referred to the Webster definition of "adequate." He said that DNRC had been involved in the review, but had not raised any issues. Discussion took place regarding water management plans and the reservoirs on Fidelity's CX field.

Harmon Ranney said that all three EISs (DEQ, BLM, and the Board of Oil and Gas) include a requirement that all development plans include a water management plan.

Mr. Shanahan MOVED to ADOPT the rule as proposed, along with the 521 and 311 analyses and the responses to comments. Mr. Hudson SECONDED the motion, and inquired about how the enforcement of it would be financed.

Jan Sensibaugh, DEQ Director, said that Chairman Russell had spoken with her about it previously and that DEQ had the ability to do, and had been doing, everything about which he asked. She said the Board had adopted new permitting fee rules; however, they currently did not provide authority to charge for insignificance determinations. Ms. Sensibaugh said DEQ would be looking carefully at the actual cost of issuing the permits, doing the enforcement and

performing on-site inspections. She said if the actual costs were more than was being collected, DEQ would come to the Board with specific coal bed methane fees.

Board members expressed a desire for updates from the Department on the monitoring of the standards as the process progresses. Ms. Sensibaugh informed the Board that Wyoming's DEQ and BLM and Montana's DEQ and BLM were meeting the following week to put together an on-going working group that will have both air quality and water quality staff. She said the groups would meet regularly and would make sure the standards are enforced.

Chairman Russell called for a VOTE and the motion CARRIED unanimously. (47:21)

B. Initiation of Rulemaking and Appointment of Hearing Officer

1. In the matter of the request of DEQ to initiate rulemaking to amend ARM 17.38.602 and 603 pertaining to administrative enforcement procedures under the Public Water Supply Law.

John Arrigo, DEQ, explained that in Public Water Supply enforcement the most common violation that is assessed administrative penalties is failure to do required monitoring. He discussed the changes to the rules and the reasons for them. Discussion took place regarding enforcement of sewage systems. Mr. Arrigo said the last time they changed these rules, DEQ sent out 1,600 notices and did not receive any comments, so they don't expect any controversy.

Mr. Bowe confirmed his availability to be the presiding officer. Mr. Shanahan MOVED to initiate the rulemaking and to appoint Mr. Bowe as the presiding officer. Mr. Hudson SECONDED the motion. Chairman Russell offered the floor to anyone wishing to speak to the rule, per House Bill 94. No one responded. The motion CARRIED with a unanimous VOTE. (58:17)

2. In the matter of the request of DEQ to initiate rulemaking to amend ARM 17.30.716 to revise nonsignificant categories for subdivisions.

Eric Regensberger, DEQ, said that the Montana Consensus Council and the legislative audit of the subdivision program requested in 2000 that the methods used for reviewing subdivision compliance with the nondegradation rules be reviewed and revised. He said he anticipates a question regarding the percolation tests in the rules. Discussion took place regarding the subdivision circulars, and adequate sites versus sites with sites with excessive amounts of rocks in the soil.

Chairman Russell opened the floor to the public per House Bill 94. No one responded. Mr. Shanahan MOVED to initiate the rulemaking and to appoint Mr. Bowe as the presiding officer. Mr. Hudson SECONDED the motion. The motion CARRIED with a unanimous VOTE. (64:14)

3. In the matter of the request of DEQ to initiate rulemaking to amend ARM 17.8.501, 504, 505, 511, 514 and 515 for the annual adjustment of air quality operation fees.

Charles Homer, DEQ, explained that the rule requires the Board to review these fees annually. He said based on an increase in appropriation for fiscal year 2004 and a decrease in carryover and total pollutants, it was necessary for the Board to increase the per-ton charge from \$17.89 to \$20.61. Mr. Homer explained other amendments, such as adopting application fees for operating permits as opposed to preconstruction applications, and revising some open burning application fees. He discussed letters the Board had received from PP&L Montana (PPL) and

discussions DEQ had with the Air Pollution Control Advisory Council and the Clean Air Act Advisory Council concerning fee restructuring.

Chairman Russell asked if anyone wanted to speak about the rule. Jim Parker, PPL, pointed out that PPL holds only two of 501 air permits issued by the state, but that it pays approximately 45 percent of the total legislative apportionment. He said PP&L would look forward to working with the Board, DEQ, industry, and other stakeholders to improve the current emission fee structure to distribute the fee burden more equitably. Mr. Parker also cited four characteristics that he hoped would be included in the new fee structure. Discussion took place regarding PP&L submitting a rule proposal next year. Also discussed was the prospect of a collaborative approach to a fee system.

Ms. Lacey MOVED to initiate the rulemaking and to appoint Mr. Bowe presiding officer. Mr. Fishbaugh SECONDED the motion. The motion CARRIED with a unanimous VOTE. (77:7)

Discussion took place concerning Colstrip's alleged violations of Class I air out of the Northern Cheyenne Reservation. Dave Klemp, DEQ, explained that they were *modeled* violations. John Coefield, DEQ, provided details on the monitoring of Colstrip 1 and 2, and 3 and 4.

4. In the matter of the request of DEQ to initiate rulemaking to amend ARM 17.8.749, 759, 763, and 764 to implement House Bill 427 and 700, enacted by the 2003 Montana Legislature.

Charles Homer informed the Board that this rulemaking was to implement House Bill 427, but would not implement HB 700 since it was decided that no changes were necessary to implement it. He said the amendments included a 30-day public comment period for certain draft air quality permits and extension of the time allowed for making a final determination. Mr. Homer also said the Department was requesting to change the requirement that the Department must serve notice of permit actions.

Chairman Russell asked if any member of the public would like to speak about this rulemaking. There was no response. Ms. Lacey MOVED to initiate the rulemaking and to appoint Mr. Bowe the presiding officer. Mr. Shanahan SECONDED the motion. The motion CARRIED unanimously. (89:4)

C. New Contested Cases

1. In the matter of Sterling Mining Company's MPDES Permit #MT0030287, BER 2003-06 WQ.

Mr. Bowe said the parties had agreed to delay submitting a schedule until July 1. He also said the Board needed to appoint a hearing examiner and that it would be appropriate to appoint him.

Mr. Shanahan MOVED to appoint Mr. Bowe hearing examiner in the case. Mr. Hudson SECONDED the motion. The motion CARRIED with a unanimous VOTE. (90:6)

2. In the matter of Spoklie's South Valley Gravel's Mined Land Reclamation Permit #SRL-001, BER 2003-07 OC.

Mr. Bowe explained that this was a dispute about an additional bond under the Opencut Mining Act. He said the case might be settled and if so, he would expect the Board to see it at the next meeting. Mr. Bowe said that it was appropriate to appoint him hearing examiner.

Mr. Shanahan MOVED to appoint Mr. Bowe as the hearing examiner. Mr. Hudson SECONDED the motion. The motion CARRIED with a unanimous VOTE. (91:9)

3. In the matter of the Notice of Violation and Statement of Proposed Penalty #OC-03-02, FID No. 632, issued to Bruce Tutvedt, Tutvedt Pit, Flathead County, BER 2003-08 OC.

Mr. Bowe explained that the case had been settled and that the settlement document was included in the Board packets. Mr. Bowe recommended the Board approve the settlement and authorize the Chairman to sign the order.

Mr. Shanahan MOVED to accept Mr. Bowe's recommendation and to have the Chair sign the order. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE. (92:8)

4. In the matter of the Notice of Violation and Statement of Proposed Penalty #OC-03-05, FID No. 652, issued to Richard Grosswiler, Beaver Wood Products, Inc., Flathead County, BER 2003-09 OC.

Mr. Bowe said that the parties had until the following week to propose a schedule and that it was appropriate that he be appointed hearing examiner in the case.

Mr. Shanahan MOVED to appoint Mr. Bowe as hearing examiner. Mr. Hudson SECONDED the motion. The motion CARRIED with a unanimous VOTE. (93:4)

D. Action on Appeals

1. In the matter of Van Dyke Construction Company, Inc. and Loughmiller Reclamation, L.L.C., BER 2002-07 OC.

Mr. Shanahan MOVED that the Board dismiss the case in accordance with the order contained in the packet. Mr. Hudson engaged discussion regarding the severity of the violations. Jolyn Eggart, DEQ, provided more details of the settlement stipulation.

Ms. Lacey MOVED to accept the orders of dismissal and to direct the Chairman to sign the orders. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE. (97:12)

2. In the matter of Northern Line Layers, Inc. BER 2002-13 OC.

Mr. Bowe explained that the parties in the case had reached a settlement, that an order was included in their packets, and that he recommended adopting the stipulation and signing the order of dismissal. Mr. Shanahan so MOVED. Mr. Hudson SECONDED the motion. The motion CARRIED with a unanimous VOTE. (98:5)

3. In the matter of Crystal View Estates, Flathead County, under Mont. Code Ann. §76-4-108, EQ #01-1095, BER 2002-05 SUB.

Chairman Russell explained that he had recused himself in this case and that he would have Dr. Smith finish this.

Mr. Bowe said his proposed decision on the motion to add parties was included in the Board packet and that there had not been any exceptions filed. He said it would be appropriate for the Board to approve the order denying the motion.

Mr. Shanahan MOVED to accept Mr. Bowe's recommendation and to authorize the Acting Chairman to sign the order. Mr. Hudson SECONDED the motion. The motion CARRIED with a unanimous VOTE. (100:6)

Mr. Bowe informed the Board that this case still ongoing and that there have been other motions filed.

4. In the matter of Derek Brown Construction, Inc., BER 2002-10 ASB.

Mr. Bowe informed the Board that he had denied DEQ's motion for partial summary judgment and then the case settled. He recommended the Board dismiss the contested case with prejudice.

Ms. Lacey MOVED to accept Mr. Bowe's recommendation and to authorize the Chairman to sign the order. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE. (101:23)

E. Other Action Items

1. In the matter of the initiation of the three-year review of temporary water quality standards adopted for the Upper Blackfoot Mining Complex.

Mr. Horpestad informed the Board that legislation requires a triennial review of progress on cleaning up the water body that has the temporary standards. He suggested scheduling the public hearing for the August 1 meeting. Mr. Hudson so MOVED. Mr. Shanahan SECONDED the motion. Mr. Hudson requested that the presentation be simple and include whether the water is any better than when they started, how much they spent, how much they have left, and what good did they do. The motion CARRIED with a unanimous VOTE. (104:18)

III. BRIEFING AGENDA ITEMS

A. Contested Case Update

1. Cases assigned to Kelly O'Sullivan

a. In the matter of applicant Town of Geraldine's MPDES Permit #MT-002-0826.

Mr. Bowe said according to Ms. O'Sullivan, the parties were working on a settlement. He said DEQ had some experts visit the site, that a status report was to be submitted to Ms. O'Sullivan later this month, and that the Board would be updated at the next Board meeting.

2. Cases assigned to Tom Bowe

a. In the matter of M&W Investments, Inc., EQ #01-1457 and #00-1822.

Mr. Bowe had nothing to add to what was written in the agenda.

b. In the matter of CR Kendall Corporation, BER 2002-09 MM.

Mr. Bowe said submittal of a schedule has been delayed to June 30.

c. In the matter of ExxonMobil Refining and Supply Company, BER 2003-01 WQ.

Mr. Bowe explained that the case had been divided into two sets of related issues. He said one set of issues required more study, which was in progress, and the other set was the contested case.

Discussion took place regarding an appeal letter that was included in the Board's supplemental packet. Mr. Bowe explained that this appeal had just recently been received and that it was not on the agenda, but would be included on the August agenda. Chairman Russell announced that he would be recusing himself from this case also. For the record, Mr. Shanahan asked Chairman Russell what was happening in Flathead County. Chairman Russell explained that there was a lot of development going on in the county.

Chairman Russell announced that the Board had a tremendous working relationship with Jim Madden, DEQ.

B. In the matter of the annual review of temporary water quality standards adopted for the New World Mining District.

This item was postponed.

IV. GENERAL PUBLIC COMMENT

Chairman Russell asked if there was any member of the public who wished to speak to the Board. No one responded.

V. ADJOURNMENT

Chairman Russell called for a motion to ADJOURN. Mr. Hudson so MOVED. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE and the meeting ADJOURNED at 4:05 p.m.

Board of Environmental Review June 6, 2003 Minutes Approved:

JOSEPH W. RUSSELL, M.P.H.
CHAIRMAN
BOARD OF ENVIRONMENTAL REVIEW

DATE